No. 14468

IN THE

United States Court of Appeals

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND, Doing Business as SIEBRAND BROTHERS CIRCUS AND CARNIVAL,
Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSSNELL, His Wife,
Appellees,

and

S. J. CARROLL,
Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSSNELL, His Wife,
Appellees.

Brief of Appellants, P. W. Siebrand and Hiko Siebrand, Upon Appeal from The United States District Court for the District of Arizona

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(Figures in Brackets refer to page of the Transcript of Record)

Statement of Pleadings and Facts Disclosing Jurisdiction

On the 10th day of September 1953, the appellees George F. Gossnell and Estella Gossnell, his wife, filed a civil action in the United States District Court for the District of Arizona, Phoenix Division, wherein they allege the following jurisdictional facts: that the appel-

lees are resident of the State of Iowa (T.R. 3); that the appellants, P. W. Siebrand, Hiko Siebrand, and S. J. Carroll, are residents and citizens of the State of Arizona (T.R. 3). The appellees seek to recover damages from the appellants in the amount of $111,215.00 (T.R. 5) for alleged injuries sustained from an accident which occurred on the bridge of Highway 60 and 70, near Tempe, Arizona, on February 20, 1953.

The pleadings, as above set forth, clearly allege jurisdictional facts sufficient to permit this suit to be filed in the District Court of Arizona, as authorized under the provisions of Title 28, Section 1332, U.S.C.A., which provides in part that the District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and is between citizens of different states. This appeal is properly filed in the United States Court of Appeals for the Ninth Circuit, pursuant to the provisions of Title 28, Section 1291, U.S.C.A., wherein it is provided in part that the Court of Appeals shall have jurisdiction of appeals from all final decisions of the United States District Courts of the United States. This appeal is from a final decision of a district court of the United States. Title 28, Section 1294, U.S.C.A., provides that the Ninth Circuit Court of Appeals is the proper circuit of the Court of Appeals to consider this matter.

Statement of the Case

For the sake of clearness in this brief, the appellants P. W. Siebrand and Hiko Siebrand will be known as "the defendants," and the appellees George F. Gossnell and Estella Gossnell will be known as "the plaintiffs."

The appellant S. J. Carroll will be known as "the truck driver."

The facts are as follows:

The plaintiffs, who are man and wife, were, on the 20th day of February, 1953, at about 10:30 in the morning, traveling Northwest on Highway 60 and 70 through the little town of Tempe, Arizona, and, at this particular time, they were proceeding on a bridge which crossed the Salt River near Tempe (T.R. 75). At the same time, the truck driver was proceeding with a truck and trailer in a Southeasterly direction on the same bridge. The truck driver was driving a truck which belonged to defendants (T.R. 204), which was pulling a trailer belong to William Siebrand (T.R. 248 & 250), the nephew of defendants, with the sign, "Siebrand Brothers Circus and Carnival" printed on the side (T.R. 256). As said parties approached each other, the trailer became disconnected from the truck and crossed the highway, and went head-on into the plaintiffs' car, and caused damage to the car and bodily injury to the plaintiffs.

Plaintiff George F. Gossnell was sixty-five (65) years of age at the time of the accident (T.R. 54). In addition to several cuts and bruises, the plaintiff George F. Gossnell received fractures of the fifth and eighth ribs on the left side, a compound fracture of the femur on the left leg, and a simple fracture of the fibula on the left leg (T.R. 146 & 147). The plaintiff George F. Gossnell was in bed in the court room throughout the entire trial, even though the defendants' doctor testified that the cast on his leg had been on for five months, without having it off for an examination, and that in his opinion, the fracture was healed (T.R. 189). The

injuries of the plaintiff Estella Gossnell were not serious. She had received bruises and a slight fracture of two ribs on the left side (T.R. 77). Plaintiffs claim medical and hospital expense in the amount of $12,027.00 (T.R. 154).

The defendants testified that the truck which belonged to them was driven by the truck driver without their knowledge or consent; that the truck driver was not and never had been employed by the defendants (T.R. 291-292), and the trailer belonged to one William Siebrand, a nephew of the defendants (T.R. 248 & 250). The undisputed testimony is that William Siebrand, a concessionaire and an independent operator and business man, who had not gone with the show yet this year, was not under the control or supervision of the defendants (T.R. 288). The truck driver had, under the instructions of his associate, William Siebrand, secured a truck for the purpose of taking the William Siebrand trailer to Mesa, Arizona to join the show. In so doing, he secured the truck of the defendants of the same type and color, parked with the keys in it on the same lot, without the knowledge or consent of the defendants (T.R. 204-205), and attached it to the trailer of William Siebrand, and was proceeding to Mesa, Arizona to join the show. The truck driver testified that the trailer had bird cages and different frames for the concession (T.R. 219). Mr. Boyd, the policeman, testified that through a hole in the corner of a trailer, he ascertained that the trailer was carrying rides, concessions and stuff for a carnival (T.R. 142). The undisputed testimony is that the trailer and trailer-hitch had been examined shortly before the truck driver took the truck and trailer, and they were found to be in good mechanical condition (T.R. 207, 226 & 239). The plain-

tiffs introduced testimony, over the objection of the defendants, that the defendant P. W. Siebrand came to the hospital where the plaintiffs were staying following the accident and introduced truck driver S. J. Carroll as the man who was driving the truck for the defendants (T.R. 81 & 89). P. W. Siebrand said that he had said that Carroll was driving the said truck, and did not use the words "for us." (T.R. 305). At the end of the case, the jury found for the plaintiffs and assessed damages against the defendants in the amount of $95,000.00. The jury assessed damages against the truck driver S. J. Carroll in the amount of $100.00. After the motion for a new trial was denied, and before this appeal was taken, the said S. J. Carroll offered to settle the judgment against him, but was refused the right to satisfy said judgment, and the said judgment still stands; however, said S. J. Carroll paid the said sum of $100.00 into court, where it is now.

We deem the pertinent questions to be decided on appeal, as raised by the facts of this case, to be as follows:

1. There was no evidence that the truck driver Carroll or the defendants P. W. Siebrand and Hiko Siebrand were guilty of negligence in any manner whatsoever.

2. There was no competent evidence adduced at the trial that the truck driver was the servant of the defendants, or that his negligence, assuming he was negligent, could in any way be imputed to the defendants.

3. The Court committed error in admitting evidence offered by the plaintiffs, over the objection of the defendants, in regard to the absence of safety chains.

4. The Court committed error in admitting the deposition of Fred Clark in evidence, when offered by the plaintiffs, in regard to certain statements made between defendant P. W. Siebrand and Mr. Clark, out of the presence of the other defendants, since there was no showing that P. W. Siebrand was acting for and on behalf of the other defendants.

5. The Court committed error in permitting the answer of plaintiff Estella Gossnell to remain in evidence over the objection of the defendants in regard to the statement that the truck driver Carroll "was driving the truck for us," without instructing the jury such evidence was not admissable against Hiko Siebrand, Siebrand Brothers Circus, and the truck driver.

6. The Court committed error in refusing to give certain instructions requested by the defendants Siebrand, and in giving certain instructions requested by the plaintiffs relating to joint adventure. This matter is more specifically set forth in the Specification of Errors.

7. The verdict of the jury and the judgment entered thereon against the defendants in the sum of $95,000.00 and against the truck driver in the sum of $100.00 are inconsistent and contrary to law.

8. The verdict against the defendants Siebrand in the sum of $95,000.00 was excessive and unreasonable, and given under the influence of passion and prejudice.

9. The judgment against the truck driver in the sum of $100.00 has been satisfied by the tender to the plaintiffs, and also into Court, of this amount of money.

Specification of Errors

I

The Court erred in denying the motion of the defendants for a directed verdict at the close of the case, for the reason that there was no competent evidence that the defendants, or their servant or employee, had been negligent in any manner whatsoever. There was no showing that the said defendants, or their servant, had done any act that they should not have done, or failed to do any act they should have done.

II

The Court erred in denying the motion for a new trial of the defendants, for the reason that there was no competent evidence that the defendants, or their servant or employee, had been negligent in any manner whatsoever. There was no showing that the said defendants, or their servant, had done any act that they should not have done, or had failed to do any act they should have done.

III

The Court erred in denying the motion of the defendants for a directed verdict at the close of the case, for the reason that there was no competent evidence showing that the truck driver Carroll was the servant of the defendants Siebrand at the time of the accident, or the servant of any person engaged in a joint enterprise with the defendants at the time of the accident. Thus, any negligence of the truck driver could not be imputed to the defendants Siebrand.

IV

The Court erred in denying the defendants' motion for a new trial upon the ground and for the reason that the verdict is contrary to law in that the jury returned a verdict against the defendants Siebrand in the sum of $95,000.00, and a verdict against the truck driver in the sum of $100.00. Such verdicts are contrary to law and inconsistent, in that any negligence of the defendants Siebrand must be derivative from the master-servant relationship, or as joint tort-feasors, and in either event, the verdict against the defendants could be no greater than the verdict against the truck driver.

V

The Court erred in refusing to grant the motion of the defendants to strike from the $95,000.00 judgment all damages in excess of $100.00, for the reason and upon the ground that the two verdicts are inconsistent and contrary to law in that any negligence of the defendants must be derivative from the master-servant relationship, and the judgment against the defendants could be no greater than the judgment against the truck driver.

VI

The Court erred in denying the defendants' motion for a new trial, for the reason that the verdict of $95,000.00 against the defendants, the circus people, was excessive and unreasonable, and was given under the influence of passion and prejudice.

VII

The Court erred in admitting evidence by the plaintiffs in regard to the absence of safety chains (T.R. 238):

"Q Now, as far as chains on that truck, you don't have any safety—

MR. WILSON: I object as being immaterial.

MR. MAHONEY: Immaterial? It is very material.

THE COURT: He may answer.

BY MR. RAINERI:

Q. You didn't have any safety chains on that truck at all, did you?

A. No sir; I did not.

on the ground and for the reason that the Arizona law does not require safety chains and the inference to the contrary from the admission of testimony relating to the absence of safety chains was prejudicial to the defendants.

VIII

The Court erred in admitting the deposition of Fred Clark over the objections of the defendants (T.R. 104 & 105):

"MR. RAINERI: May the deposition be marked as Plaintiffs' Exhibit 4 in evidence?

MR. GIBBONS: If the Court please, I would like at this time to move to strike the testimony of the previous witness, Fred Clark, as to the defendant, S. J. Carroll, since it purports to be a conversation which occurred several days after the accident, and not in his presence. It doesn't even purport, your Honor, to bind him in any way whatsoever.

THE COURT: I will consider that. Go ahead.

MR. RAINERI: We will offer the deposition. It is marked Plaintiffs' Exhibit 4, and we will offer that in evidence.

MR. WILSON: If the Court please, may I object on behalf of Hiko Siebrand, on the grounds stated by Mr. Gibbons, on the ground it is not binding, a conversation occurring after the occurence, and not in his presence?

THE COURT: All right.

MR. RAINERI: Is that received?

THE COURT: It is already in the record. I don't know what you want that for. It may be received.

THE CLERK: Plaintiffs' Exhibit 4 in evidence."

for the reason that the truck driver and the defendant Hiko Siebrand were not present at the time such statements were made and the power of a partner to act for the firm extends only to the transaction of partnership business, and admissions by a partner assuming to speak for himself are not evidence against the firm.

IX

The Court erred in admitting evidence offered by the plaintiffs over the objections of the defendants in regard to the statement of the plaintiff, Mrs. Estella Gossnell, wherein the defendant P. W. Siebrand was alleged to have introduced the truck driver Carroll as "the man who was driving the truck for him that day." (T.R. 81).

The evidence admitted is as follows:

"Q. On any of these occasions that Mr. P. W. Siebrand came over to see you, was anybody else ever with him?

A. Yes, he brought Mr. Carroll.

Q. Who is Mr. Carroll?

A. Mr. Siebrand introduced him as the man who was driving the truck for him that day, and he brought him over to meet us.

MR. WILSON: Just a moment. I object to the answer as not responsive, and I move it be stricken as prejudicial to this defendant.
I had no warning that the answer could possibly be that.

MR. GIBBONS: May we have the time and place fixed your Honor, with reference to the defendant Carroll?

THE COURT: The answer may stand. Go ahead."

for the reason that the power of a partner to act for the firm extends in general only to the transaction of the partnership business, and admissions by a partner assuming to speak for himself are not evidence against the firm.

X

The Court erred in refusing to give defendants' requested instruction No. 2, which reads as follows: (T. R. 35).

"You are instructed that a joint adventure is an association of persons to carry out a single business enterprise for a profit for which purpose they com-

bine their property, money, efforts, skill and knowledge. Each participant therein is agent for each of the others and it is essential that each have control of the means employed to carry out the common purpose.

"To constitute a joint adventure there must be more than the mere fact of a share in the profits of the business. One of the most important tests of a joint adventure is whether there is a share in the losses."

on the ground and for the reason that such instruction is a correct statement of the law relating to joint adventure, is justified by the evidence in the instant case and the refusal to give such instruction was prejudicial to the defendants.

XI

The Court erred in refusing to give defendants' requested instruction No. 3, which reads as follows: (T. R. 36).

"You are instructed that parties cannot be said to be engaged in a joint enterprise within the meaning of the law of negligence unless there is a community of interest in the undertaking and an equal right to govern and direct the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. In other words, in this case, in order to find that a joint adventure existed between William R. Siebrand, the owner of the trailer involved in the accident, and P. W. Siebrand and Hiko Siebrand, the owners of Siebrand Brothers Circus and Carnival, you must find that William R. Siebrand had a voice and a right to be heard in the control and management of the circus and carnival and that the Siebrand Brothers had a voice and right to

be heard in the control and management of the bird store, operated as a concession by Carroll for William R. Siebrand.

"You are further instructed that in order to find that a joint adventure existed between the parties, last named, you must find that they had an agreement, express or implied, to share the profits and losses of the business and not an agreement for the payment of rent by William R. Siebrand to P. W. Siebrand and Hiko Siebrand, the owners of the Siebrand Brothers Circus and Carnival, and you must find that there was such an intent of each of the parties thereto to become joint adventurers and to exercise joint proprietorship and joint control of the circus and carnival and all the concessions so owned by the said William R. Siebrand."

on the ground and for the reason that such instruction is a correct statement of the law relating to joint adventure, is justified by the evidence in the instant case and the refusal to give such instruction was prejudicial to the defendants.

XII

The Court erred in refusing to give defendants' requested instruction No. 4, which reads as follows: (T. R. 38).

"You are instructed that a mere rental agreement for the rental of space does not create a joint adventure even though the consideration for the rental is based upon percentage of the gross sales.

"Should you find that William R. Siebrand, in the operation of his bird-store concession, was merely renting space from P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and that the consideration for the rental of space was based upon a percentage of the sales made during the operation of the conces-

sion, then you must find that no joint adventure was created."

on the ground and for the reason that such instruction is a correct statement of the law relating to joint adventure, is justified by the evidence in the instant case and the refusal to give such instruction was prejudicial to the defendants.

XIII

The Court erred in giving plaintiffs' requested instruction No. 2, which reads as follows:

"You are instructed that if you find from a preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand, and William Siebrand intended and did join their efforts in furtherance of the Circus and Carnival Show to be shown at the Maricopa County Fair at Mesa for their joint profit, then you may find that they were joint adventurers and were jointly and severally liable for the negligent conduct of the defendant S. J. Carroll. I further instruct you that, if you find from a preponderance of the evidence in this case, that such negligence was the proximate cause of the injuries and damages sustained by plaintiffs George F. Gossnell and Estella Gossnell, or proximately contributed to cause same, then they may recover from the defendants, and your verdict would be for the plaintiffs."

The defendants objected to plaintiffs' instructions on joint adventure and joint enterprise on the following grounds (T.R. 329):

"The defendants P. W. Siebrand and Hiko Siebrand object to plaintiffs' instructions on the ground that all of the instructions pertaining to joint adventure and joint enterprise are lacking in

the total essential elements to constitute an instruction in connection with the failure to state that it is necessary, to constitute a joint enterprise or joint adventure, that the parties must have entered into the same knowingly and voluntarily, and that they must have been liable for participation in the losses of the joint adventure or the joint enterprise."

XIV

The Court erred in granting plaintiffs' requested instruction No. 3 relating to joint adventures, which instruction reads as follows:

"You are instructed that joint adventurers are liable to third persons as partners for wrongful acts committed in conducting the joint enterprise, and each joint adventurer may be liable for the negligence of his associate or of any agent, servant, or employee of his associate joint adventurer, if the negligent act or conduct is within the scope of the joint undertaking. You are further instructed that with respect to a joint adventure involving the control and operation of a motor vehicle, all joint adventurers are liable for personal injuries suffered by others from the negligent operation of said motor vehicle including instances in which the actual negligence is that of agents and employees of the joint adventurers acting within the scope of the joint undertaking."

Defendants objected to plaintiffs' instruction No. 3 on the following grounds (T.R. 329, L: 9-21).

"The defendants P. W. Siebrand and Hiko Siebrand object to the plaintiffs' instructions on the ground that all of the instructions pertaining to joint adventure and joint enterprise are lacking in the total essential elements to constitute an instruction in connection with the failure to state that it

is necessary, to constitute a joint enterprise or joint adventure, that the parties must have entered into the same knowingly and voluntarily, and that they must have been liable for participation in the losses of the joint adventure or the joint enterprise."

XV

The Court erred in granting plaintiffs' requested instruction No. 5 relating to joint adventures, which instruction reads as follows:

"You are instructed that if you find from a preponderance of the evidence that the act of the defendant S. J. Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise in which P. W. Siebrand, Hiko Siebrand, and William Siebrand were interested then and in such event, you are instructed that P. W. Siebrand, Hiko Siebrand, and William Siebrand were joint adventurers.

"You are further instructed that it is immaterial that the particular journey is a single transaction; or that the truck and trailer were owned by P. W. Siebrand, Hiko Siebrand or by William Siebrand or by all of them jointly; the use of the truck and trailer as a part of a common business enterprise makes each of them responsible for the manner in which it was operated."

Defendants objected to plaintiffs' requested instruction No. 5 on the following grounds (T.R. 329):

"Specifically, that the defendants Hiko Siebrand and P. W. Siebrand, object to plaintiffs' instruction Number 5 so given by the court, on the ground that it is not supported by critical evidence."

XVI

The Court erred in charging the jury as requested in plaintiffs' instruction No. 8, which reads as follows:

"You are instructed that a duty rests upon every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured he shall answer for the damage.

"You are further instructed that the rule of imputed negligence stemming from a joint enterprise, rests upon the relationship of agency existing among persons engaged in a joint or common enterprise, and that the theory upon which the doctrine of joint enterprise rests is that the associates in the enterprise are partners or that each is an agent for the other."

The objection of the defendants to plaintiffs' instruction No. 8 reads as follows (T.R. 329):

"The defendants P. W. and Hiko Siebrand except to plaintiffs' instruction number 8 on the ground that it is not a correct statement of the law in such cases made and provided."

XVII

The Court erred in denying the motion of the truck driver Carroll for satisfaction of judgment, after Carroll had paid the full amount of the judgment against him in the Court, for the reason that the Court was without authority to deny the satisfaction of such judgment after such amount was tendered into Court.

Summary of the Argument

It is the contention of the defendants that the District Court should have granted their motion for a directed verdict at the close of the plaintiffs' case, and at the conclusion of the entire case, for the reason that

there was no evidence that the defendants or their servant were negligent in any manner whatsoever.

It is urged that there was no competent evidence adduced at the trial tending to show that the truck driver was the servant or employee of the defendants, or that his negligence, assuming but without admitting that he was negligent, could in any way be imputed to the defendants.

Defendants assert that a verdict against the master in the sum of $95,000.00, and a verdict against the servant in the sum of $100.00, or against joint tort-feasors in like amounts, are inconsistent and contrary to the law, and cannot stand.

The verdict against defendants in the sum of $95,000.00, in view of all the evidence and taking into consideration the ages of the plaintiffs, was exeessive and unreasonable, and was given under the influence of passion and prejudice.

It was prejudicial to the defendants for the District Court to admit evidence offered by plaintiffs, over the objections of defendants, in regard to safety chains, when the State law does not require that safety chains be used.

Defendants contend that the District Court committed prejudicial error in admitting statements of defendant, P. W. Siebrand, made after the accident upon occasions when neither the truck driver nor the defendant Hiko Siebrand was present, without limiting the effect of such statements to the defendant P. W. Siebrand.

Defendants maintain that there was not sufficient evidence to warrant the District Court giving instructions concerning joint adventure, but assuming such evidence was present, the Court still erred in giving instructions on joint adventure which did not properly state the law on the subject.

The judgment against the truck driver in the sum of $100.00 has been satisfied by the tender of such amount to the plaintiffs, and upon their refusal, to the Court, and the truck driver is entitled to a complete release from any liability under the judgment. And the satisfaction of a judgment against one joint tort-feasor is a satisfaction against all.

Argument

Proposition of Law No. 1

The doctrine of res ipsa loquitur does not apply where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible.

Specification of Errors Nos. I and II will be discussed in connection with the argument on the first proposition of law.

There was no evidence adduced at the trial that the defendants or the truck driver Carroll were negligent in any manner, or if negligent, that such negligence was the proximate cause of the injury to the plaintiffs. To establish negligence, the plaintiffs rely upon the doctrine of res ipsa loquitur. We submit that the facts in this case do not justify the application of the doctrine. The statement of law quoted above as proposition of law No. 1 is almost a direct quote from the Arizona

case of *Stewart* v. *Crystal Coca Cola Bottling Co.*, 50 Ariz. 60, 68 P. 2d 952.

In the *Stewart* case, a bottle of coca cola was sold by the defendant, Coca Cola Bottling Company, to the plaintiff Cynthia Stewart. The plaintiff put several bottles of coca cola in an ice box, covering them with ice water. About two hours later, the plaintiff reached in the coca cola box and moved the bottles around. One of the bottles exploded and a piece of glass struck the hand of the plaintiff and injured it. In discussing the doctrine res ipsa loquitur in this case, at Page 954 of the Pacific Reports, it is stated:

> "This rule is merely one of evidence and is applicable only where the instrumentality causing the injury is under the control of the defendant and the accident is of such a character that in the ordinary course of events would not happen if those having control of it use due care."

At Page 956 of the Pacific Reports, the court stated:

> "Inasmuch, therefore, as it is just as probable the explosion was due to the action on glass of sudden changes in temperature, as it is that it was caused by an overcharge of gas or by a defective bottle, the rule of res ipsa loquitur does not apply. It is only where the existence of negligence is a more reasonable deduction from the facts shown that a plaintiff is permitted to call this rule to his aid. It 'should not be allowed to prevail where, on proof of the occurrence, without more, the matter still rests on conjecture alone'."

The Court in the *Stewart* case held that it is purely a guess whether the accident was due to an overcharge of gas or a defective bottle, either of which defendant

might be responsible for, or whether it was caused by the action on glass of a sudden change in temperature, which the defendant was not liable for. The court then said:

> "And this being true, the following statement in *Biddlecomb* vs. *Haydon,* supra, is particularly pertinent: 'Neither does it (res ipsa loquitur) apply where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible'."

The statement quoted from the *Stewart* case is likewise particularly pertinent to the case at bar. In the present case, it is truly and simply a matter of conjecture as to what was the cause of the accident in which plaintiffs were injured. The accident could have been caused by the manner in which the truck driver Carroll drove the truck at this particular time. There was no evidence that such was the case. The accident might have been caused by a defective trailer hitch on the trailer, which could have been ascertained by a careful examination. There is no evidence that this theory was the cause of the accident. As a matter of fact, the testimony is to the effect that an inspection was made and from all appearances, the trailer and trailer hitch were in good mechanical condition. (T.R. 239). The accident could have been caused by a latent defect in the trailer hitch, which was not visible and could not have been detected by a careful examination. This appears to be the most logical explanation of the accident, and of course, if this were the cause of the accident, then the defendants would not be liable for failing to discover a defect that could not be discovered by exercising reasonable diligence.

In the case of *Sawyer* v. *People's Freight Lines, Inc.,* 42 Ariz. 145, the plaintiff attempted to evoke the

aid of the doctrine of res ipsa loquitur. In the *Sawyer* case, an accident occurred between the defendant's truck and a horse upon which the plaintiff was riding, the place of the accident being a few feet north of the paved portion of the highway. In the course of the opinion, the court stated that where two objects come together in a collision while under separate control, the doctrine of res ipsa loquiture cannot be applied, and no inference or presumption that the collision was caused by one more than the other can be reasonably drawn. The court then quotes with approval, at Page 150 of the Arizona Reports, from *Wilbur* v. *Home Lumber Company*, 131 Ore. 180, 282 P. 236, and *Johnson* v. *Herring*, 89 Mont. 420, 300 P. 535, as follows:

> "Where there are several persons or causes which might have produced the injury, some of which were under the control or management of defendant and others of which were under the control or management of the complaining party or of third persons, and the accident may have reasonably occurred by reason of acts for which defendant is not liable, the doctrine cannot be invoked. So the mere possibility that defendant's act could have caused the damage does not warrant the application of the doctrine, and the same is true where it is a matter of surmise or conjecture only that the damage was due to a cause for which defendant is liable."

It is the contention of the defendants that the facts of this particular case do not fall within the res ipsa doctrine, since the cause of the accident can only be arrived at by surmise, conjecture or speculation, and when such is the case, the doctrine of res ipsa cannot be invoked to prove the necessary negligence required to be proved by the plaintiff.

Proposition of Law No. 2

> To hold one person responsible for the acts of another on the theory that one is the master (employer) and the other is the servant (employee) there must be a showing that there was a contract between the parties which gives the master control of the details of the work of the servant. The master must have power to hire and dismiss the servant. The servant must perform the services provided for by the master, and there must be a provision for the compensation of the servant.

Specification of Error No. 3 will be discussed in connection with the foregoing proposition of law.

The law is clear that before one party can be held responsible for the acts of another on the theory of the master-servant relationship, a state of facts must exist which would embody all of the elements set forth in the foregoing proposition of law. This is a universally accepted rule. The law of master-servant is defined in 35 Am. Jur., p. 445, Sec. 2. In this discussion of the meaning of master and servant, it is pointed out that all of the elements mentioned herein must be present in order to make the "master" responsible for the acts of the "servant." The following citations are in point: *Buhler* v. *Maddison,* 267 Utah 267, 176 P. 2d 118; *Hinds* v. *Dept. of Labor and Industries,* 150 Wash. 230, 272 P. 734; 62 A.L.R. 225; *Ocean Accident and Guarantee Corp., Ltd., Insurance Carrier* v. *Charles D. Kennison,* et al 42 Ariz. 349, 26 P. 2d 113.

None of the elements of agency above set forth was established in this case. While it was shown that the truck driver was driving the truck of the defendants Siebrand, it was clearly shown from undisputed testimony, and there was no competent evidence to the con-

trary, the truck driver was driving the truck without the knowledge or consent of the defendants Siebrand. While it is the law of Arizona that the proof of ownership of an automobile is prima facie evidence that the driver thereof is a servant or agent of the owner, this presumption is overcome when undisputed testimony is shown that the driver is under the control or supervision of someone other than the owner. In this case the truck driver Carroll testified that he had taken the truck which was involved in the accident by mistake, and that he was not working for the defendants Siebrand, and in fact, was working for one William Siebrand, who is not a party to this action (T.R. 204).

The only evidence upon which it could be established that the truck driver was the servant of the defendants is, first, the alleged statement by the defendant P. W. Siebrand, when talking to the plaintiff Mrs. Gossnell, that the truck driver Carroll was introduced as "the man who was driving the truck for him that day" (T.R. 81). We respectfully submit that this evidence was incompetent and prejudicial to the defendants for the reason that the power of a partner to act for the partnership extends in general only to the transaction of partnership business, and admissions by a partner assuming to speak for himself are not evidence against the firm. This matter is more fully discussed under proposition of law No. 7.

Second, the testimony of the policeman Boyd that the truck driver informed him that he was employed by Siebrand Brothers Circus and Carnival (T.R. 127). This statement was purely hearsay and was incompetent to prove agency, since agency cannot be established by extra-judicial admissions, statements or declarations of the agent. 2 Am. Jur., p. 352, Sec. 445.

This is the complete testimony tending to establish that the truck driver was the servant of the defendants. Such evidence is not competent to show a master-servant relationship existed between the defendants and the truck driver.

Counsel for plaintiffs might urge that the truck driver was the servant of William Siebrand, and that William Siebrand was in a joint adventure with the defendants. We vigorously oppose any such theory and assert that there was no evidence of a joint adventure. This question will be more thoroughly discussed in connection with proposition of law No. 8.

Proposition of Law No. 3

> The amount recovered as actual or compensatory damages against a servant is the limit of the amount to be recovered as damages against the master in those cases where the negligence of the master is derivative.

Specification of Errors Nos. IV and V will be discussed in connection with the argument on propositions of law Nos. 3 and 4.

Proposition of Law No. 3 is based on the law of negligence as it relates to master and servant. We do not, however, admit that the truck driver was the servant of the defendants, or was the servant of one engaged in a joint adventure with the defendants, but will, for the purpose of this argument, assume that the truck driver was the servant of the defendants.

The general rule that a judgment against the servant is limited to the amount recovered against the master where the only negligence of the master is

derivative is set forth in 35 Am.Jur.Supp., Sec. 591, at Page 72. This section reads in part as follows:

> "The rule is established in most jurisdictions in which the question has arisen that the amount recovered as actual or compensatory damages in a tort action against a servant who was the active tortfeasor is the limit of the amount recoverable as damages against the master whose responsibility is solely derivative, and this rule applies in situations in which the judgment is recovered against the master in an action against him which is subsequent to the action in which the judgment was rendered against the servant, as well as in situations in which the judgment is rendered against the master in the same action as that in which the judgment is rendered against the servant."

There is little dissent from the general rule above quoted. The decisions almost universally conform to this rule of law. In *Ferne* v. *Chatterton,* 363 Pa. 191, 69 Atl. 2d 104, an action was brought against the owner of the truck and the driver of the truck to recover damages arising out of a traffic accident. There were three plaintiffs in the case, the widow of the deceased, the estate of the deceased, and the daughter. A judgment was recovered against the driver in behalf of the estate for $50.00; a judgment was rendered in favor of the daughter against the driver for $50.00; the widow recovered nothing against the driver. Against the owner of the truck, the widow recovered $1,500.00; the estate recovered a judgment for $2500.00; the daughter recovered a judgment for $5000.00. At Page 107 of the Atlantic citation, the court stated:

> "It is obvious that such verdicts are legally indefensible, since the liability of Chatterton (owner) results solely from his status as employer, upon the

> principle of respondeat superior; there being no question of punitive damage in the case, it is clear that he cannot be assessed a greater measure of damages than that imposed upon his employee, who was the active joint tort-feasor. Even in an action against joint tort-feasors, the verdict must be for a lump sum against all, and the damages cannot be apportioned among them, and where the defendants are in the relation of employer and employee, as in the present instance, the applicability of this principle is even more obvious."

In *Phinnix* v. *Griffin,* 221 N.C. 348, 20 SE 2d 366, the plaintiff sued both master and servant for a tort committed by the servant in the course of his employment. In the first trial, a non-suit was granted against the master, and a judgment was recovered against the servant in the amount of $1000.00. On appeal, the non-suit against the master was reversed, and on the trial of the case the plaintiff recovered a judgment in the sum of $5000.00. The court stated:

> "The rule is general and well settled that where the liability, if any, of a principal or master to a third person is purely derivative and dependent entirely upon the principle of respondeat superior, the judgment on the merits in favor of the agent or servant, or even a judgment against him, insofar as it fixes the maximum limit of liability, is res judicata in favor of the principal or master, where he was not a party to the action."

Also, in 141 A.L.R., at Page 1168, there is an annotation relating to the amount of recovery in tort actions against a servant or other person who was the active tort-feasor as the limit of the amount recoverable against one whose responsibility was only derivative. At Page 1169, the general rule is stated to be almost

identical with the rule above quoted in 35 Am.Jur. Supp., Sec. 591, Page 72.

Sec. 96 of the Restatement of Judgments at Page 472 provides:

> "(1) Where two persons are both responsible for a tortious act, but one of them, the indemnitee, if required to pay damages for the tort, would be entitled to indemnity from the other, the indemnitor, and the injured person brings an action against the indemnitor because of such act, a valid judgment
>
> (a) for the defendant on the merits for reasons not personal to the defendant terminates the cause of action against the indemnitee;
>
> (b) for the plaintiff binds him as to the amount of recovery in a subsequent action by him against the indemnitee, but does not bind the indemnitee in any respect."

At Page 478 of Restatement of Judgments, under Sec. 96, the following example is set forth:

> "3. A, who is B's servant, injures C. In an action by C against A, judgment is given for C in the amount of $1000.00. In a subsequent action by C against B on the ground that A was negligent in the scope of his employment, C's possible recovery of damages is limited to $1000.00."

In 16 A.L.R. 2d, at Page 969, there is an annotation concerning the Court's power to grant a new trial as to both defendants over their objection, where the jury renders one verdict holding the employer liable, and another verdict absolving the employee from any liability. This question is closely akin to the one in the present case where the verdict against the employer is

in a greater amount than the one against the employee. In each case it is a question of inconsistent verdicts, when such employer or servant is the active tort-feasor, and the only negligence of the master or employer is derivative from the acts of the servant.

Apparently, the only real question considered in the annotation in 16 A.L.R. 2d is whether or not the master or employer was completely released from any liability by the holding that the servant is not liable or whether a new trial should be granted. At Page 969, it is stated:

> "The propriety of granting a new trial as to both defendants, even over their protest, where the jury has returned an inconsistent verdict, holding the master liable for exonerating the servant, whose negligence is the basis of the action, has been recognized in a number of cases."

There is a compiler's note at the bottom of Page 969, which is significant. It states:

> "No attempt has been made to collect the numerous cases wherein a new trial has been granted at the request and with the concurrence of one or both of the defendants, since, if the verdict is recorded as faulty at all, they should obviously be entitled to at least this relief."

In *DeGraff* v. *Smith*, 62 Ariz, 261, 157, P. 2d 342, the defendant Munday was driving a truck for the defendant DeGraff, and while proceeding along the highway, Munday stopped the truck on the righthand side of the highway because of a broken axle. Before the defendant could place flares upon the highway indicating that the truck had stopped, the car in which the plaintiffs were traveling ran into and against the

unlighted truck, injuring the plaintiffs, and the plaintiffs brought action for damages against the defendant DeGraff, the owner of the truck, and against the defendant Munday, the driver of the truck. At the time of trial, the plaintiffs' attorney moved to dismiss the complaint against the defendant Munday. The complaint was dismissed and the trial proceeded against the defendant DeGraff. At the conclusion of the trial, the jury returned a verdict in the sum of $2000.00 against the defendant and in favor of the plaintiff. Before entry of judgment on the verdict, the defendant DeGraff filed a motion for judgment nothwithstanding the verdict, on the grounds that she could be held liable only on the theory of respondeat superior, and the dismissal with prejudice against Munday, her servant, operated as a bar to the verdict and is res judicata as to the negligence of the defendant DeGraff. The theory of the plaintiff was that DeGraff and Munday were joint tort-feasors, and they had the right to continue their action against DeGraff, after dismissing against Munday. At Page 343 of the Pacific Report, the court stated:

> "Defendant DeGraff contends that joint tort-feasors are those who jointly, or by some concerted action, commit the wrong, and that active participation in the alleged negligence is necessary to constitute a person a joint tort-feasor. It is the defendant's contention that this is a case of master and servant and that the master's responsibility does not make him a joint tort-feasor, but that his liability is solely derivative. With this proposition we agree."

At Page 343, the court quotes from *Interstate Motor Freight* v. *Henry*, 111 Ind. App. 179, 38 NE 2d 909, as follows:

"It is well established by a number of decisions in this state that where an action proceeds upon the theory that the relation of master and servant exists between the defendants, and that the master is liable solely because of the negligent acts of the servant, that a verdict in favor of the servant and holding the master guilty of negligence relieves not only the servant but the master from liability. (Citing cases.) These holdings are in accordance with the weight of authority in other states. Where a master and servant are joined as parties defendant in an action for injuries inflicted by the servant, a verdict which exonerates the servant from liability for injuries caused solely by the alleged negligence of the servant requires also the exoneration of the master. (Citing cases.)

"But a verdict in favor of one servant does not bar a recovery against the master, where the evidence shows that the negligence of another servant who is not joined as a party, or who if joined as a party is not exonerated by the verdict, has caused the injury. Nor does the verdict in favor of a joined servant bar a recovery against the master where the latter has himself been guilty of acts on which, independently of the acts of the servant, liability may be predicated." (Citing cases.)"

In answer to the last portion of the quote, the court stated:

"We can eliminate one feature of that case and that is wherein it says: 'Nor does the verdict in favor of a joined servant bar a recovery against the master where the latter has himself been guilty of acts on which independently of the acts of the servant, liability maye be predicated.' There is no evidence in the case that the defendant DeGraff was guilty of an act of negligence on which, independently of the acts of the servant, liability may be predicated."

We deem this case particularly significant inasmuch as the factual situation is quite similar. It is interesting to note that even though the truck stopped on the road, or immediately off the road, because of a broken axle, the court did not deem the failure to inspect the axle an act of negligence on the part of the owner of the truck, but held that any negligence of the owner must result from the doctrine of master and servant through the negligence of the driver of the truck.

It is the contention of the defendants that the evidence unequivocally shows that if the defendants were negligent in any manner whatsoever, such negligence could only exist through the acts of their servants. Neither of the defendants were driving the truck or in any manner had any specific control over the truck at the time of the accident. As a matter of fact, they were many miles from the scene of the accident. There is no evidence showing that either of the defendants assisted in connecting the truck to the trailer. The record is absolutely void of any evidence which connects the defendants with any active participation which could be construed as negligent conduct in connection with this accident. The evidence does show that the truck was being driven at the time of the accident by truck driver Carroll (T.R. 204). Likewise, the evidence conclusively shows that truck driver Carroll hooked up and connected the trailer to the truck and at the time of so doing neither P. W. nor Hiko Siebrand was present (T.R. 205). Furthermore, the plaintiffs did not allege in their complaint nor introduce any evidence whatsoever at the time of the trial that there was any negligence on the part of the defendants other than the alleged negligence which occurred at the time of the

collison. In this regard, the third paragraph of plaintiffs' amended complaint, the only paragraph touching on this matter, reads as follows:

> "On February 20, 1953, while plaintiffs were proceeding in their automobile in a northerly direction on the Tempe bridge just north of the business district of Tempe, Arizona, defendants so negligently, carelessly and wantonly maintained and operated their motor vehicle and a heavily loaded trailer attached thereto, as to cause said trailer to become disconnected, and run into the automobile of plaintiffs with great force and violence." (T.R. 3 & 4)

In analyzing this allegation of the complaint, it is obvious that the only acts of negligence of the defendants referred to are those that occurred during the time plaintiffs were proceeding in a northerly direction on the Tempe bridge. At such time and place, the truck driver was operating and maintaing the vehicle of the defendants in a southerly direction on the Tempe bridge. The plaintiffs did not produce one iota of evidence at the trial that the defendants Siebrand were negligent in any other manner. Inasmuch as the truck driver Carroll was in complete control and charge of the vehicle at this time, and the defendants were not present and exercised no physical control over the vehicle, the unescapable conclusion must be that if the defendants were negligent in any manner whatsoever, such negligence was derived from the actions of the driver in operating and maintaining the truck at the time of the accident.

We respectfully urge that in this particular case the verdict against the defendants Siebrand cannot be any greater than the verdict against the truck driver.

Carroll, and inasmuch as the plaintiffs have not appealed from the verdict in the sum of $100.00 against Carroll, the truck driver, as stated by the earlier cases cited, the judgment against the defendants Siebrand should be limited to $100.00. Should the Court disagree with this reasoning, we submit that in any event, the verdicts are inconsistent, and the defendants are entitled to at least a new trial.

Proposition of Law No. 4

> The amount of damages to be assessed against two joint tort-feasors cannot be apportioned, but must be in the same amount against all such joint tort-feasors.

We do not concede that the defendants Siebrand and the truck driver Carroll were joint tort-feasors. We respectfully represent that if the defendants Siebrand were negligent in any manner, it was derivative negligence, as set forth in the argument under proposition of law No. 3. Before the defendants Siebrand can be properly classified as joint tort-feasors, they must have actively participated in the commission of the injury. In 52 Am.Jur., Sec. 113, Page 454, it is stated:

> "Indeed, it has even been declared that to render persons joint tort-feasors, they must actively participate in the act which causes the injury."

See also *DeGraff* v. *Smith,* 62 Ariz. 261, 157 P. 2d 342, supra, which likewise states that to be joint tort-feasors, there must be active participation in the alleged negligence.

As heretofore stated, there was no active participation on the part of the defendants Siebrand. The only

possible theory upon which the defendants Siebrand could be designated joint tort-feasors is that they were negligent in failing to inspect the trailer-hitch on the truck and trailer. The plaintiffs did not allege such negligence in their complaint and introduced no evidence at the time of the trial in this connection. Furthermore, it was established by competent evidence at the trial that the trailer-hitch on the truck was in good working order after the accident and in no way contributed to the accident (T.R. 283). There was some evidence that the trailer-hitch connected to the trailer broke at the time of the accident (T.R. 241). There was no evidence that the inspection of the trailer-hitch on the trailer would have revealed any patent defect. As a matter of fact, the testimony was that both the truck and trailer were inspected in regard to the trailer-hitch before they were hooked up and were apparently in good condition insofar as an inspection woud reveal (T.R. 239, 226 & 207). Furthermore, it should be remembered that the trailer belonged to William Siebrand (T.R. 248 & 250). And there was no obligation whatsoever upon the defendants Pete and Hiko Siebrand to inspect said trailer or any obligation on their part in connection with said trailer, unless William Siebrand, Pete Siebrand and Hiko Siebrand were engaged in a joint enterprise. We assert that they were not and this matter will be discussed later in the argument. In any event, the plaintiffs did not allege any negligence on the part of the defendants Siebrand in connection with inspecting the truck and trailer, and even if such negligence had been alleged, all of the evidence established that as far as one could tell by inspection, the truck and trailer hitches were in good mechanical condition. For these reasons, we assert that the truck driver Carroll and the defendants Siebrand were not joint tort-feasors.

Assuming, for the purpose of argument, however, that the truck driver Carroll and the defendants Siebrand were joint tort-feasors, the assessment of damages against each of them must be for one sum and cannot be severally apportioned. The judgment must be a joint judgment for one amount against all of those found liable.

The general rule that a judgment against joint tort-feasors must be one judgment and cannot be apportioned is set forth in Vol. 49 C.J.S., Sec. 36(a), at Page 85, at which page it is stated:

> "In actions at common law for tort, while judgment may be entered against certain defendants and in favor of others, the judgment must be a joint judgment for one single amount against all found liable, and cannot exceed in amount that for which judgment could have been rendered under a verdict returned against a particular defendant."

In the case of *Wear-U-Well Shoe Co.* v. *Armstrong,* 176 Ark. 592, 3 SW 2d 698, the plaintiff sued the corporation and the auditor of the corporation for malicious prosecution. A verdict was returned against the auditor in the sum of $750.00, and a verdict was returned against the shoe corporation in the sum of $1,750.00. In reversing the judgment of the lower court because of inconsistent verdicts, the court stated:

> "The lower court should have rendered a judgment upon the finding or verdict of the jury in the said sum of only $750, since the jury fixed the liability of each tort-feasor and that of the auditor, who actively committed the wrong, his company only being liable therefor as having consented thereto and authorized his acts, and since he was liable also for the whole damage resulting, there could be no

greater recovery against either or both of the joint tort-feasors than the lower sum ($750) assessed by the jury against the auditor."

In *Gonsalves* v. *Baptiste,* 122 Atl. 340, 45 R.I. 365, the plaintiff sued the sheriff, and the person who filed the suit, for wrongful replevin. Judgment was returned against the sheriff in the amount of $25.00, and against the person filing the suit in the amount of $750.00. In the course of its opinion, the court stated:

"The proceeding is against the defendants as joint tort-feasors. That being so, the only verdict which could be properly rendered by the jury would be a single verdict against both of them.

"We think the trial court should have granted the defendants motion for new trial on the ground that the verdict of the jury was contrary to the law as given to them and unsupported by the evidence."

In *Brady* v. *City of Philadelphia,* 41 Atl. 2d 355, 156 Pa. S 607, the City and adjoining property owners were sued for damages resulting from a faulty sidewalk. A verdict was returned in the sum of $813.00, $100.00 of which was apportioned against the City and the balance against the property owners. The court stated that the verdict was improper in form, and granted a new trial for that reason.

In *Southwestern Gas & Electric Co.* v. *Godfrey,* 178 Ark. 103, 10 SW 2d 894, the jury returned a verdict against one joint tort-feasor in the sum of $14,000.00, and against the other joint tort-feasor for $4,000.00. The court held:

"There could be no greater recovery against either or both the joint tort-feasors than the smaller

amount assessed by the jury against one of them."

In *Watt* v. *Combs,* 12 So. 2d 189, an Alabama case, the court held:

> "In an action against joint tort-feasors, the assessment of damages must be for a lump sum against those found guilty and cannot be severally apportioned between them."

In *Washington Light Company v. Lansten,* 172 U.S. 534, 43 Law Ed. 543, the Supreme Court of the United States considered this question and stated at Page 550 of the Law Ed. Report:

> "The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against the company alone. All the defendants joined in a plea of not guilty, and the jury could not find a verdict of guilty against all, and apportion the damages among the several defendants by giving a certain amount as against the company and a certain other amount as against the individual defendants. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability."

In *Boyerman* v. *Detroit Free Press,* 272 NW 876, 275 Mich. 480, the court stated:

> "That the court erred in permitting such an apportionment of damages when plaintiff had elected to sue both defendants in one action is very obvious. Wrongdoers sued together and found guilty in an action for slander or libel, or any other form of tort, are liable for the whole injury to the plaintiff; and the question as to whether one is more

culpable than another is of no importance, for each is liable for all the damages, without regard to the degrees of guilt."

In *Oldham* v. *Aetna Insurance Company,* 17 Cal. App. 2d 144, 61 P. 2d 503, the jury assessed damages against one of two joint tort-feasors, both of whom were sued in the same action, at $282.00 special damages, and $6000.00 compensatory damages, and rendered a verdict against the other defendant for $282.00 special damages, and $4000.00 compensatory damages, and upon said verdict the trial court rendered judgment against one of the defendants for the sum of $6,282.00, and against the other defendant for the sum of $4,282.00, the appellate court reversed the judgment, stating:

"In an action for damages for false arrest, where evidence supported the finding that defendants were joint tort-feasors, judgment awarding certain sums as special and compensatory damages, as against one defendant, and a different sum as special and compensatory damages against the other defendant, held: erroneous, since damages were not severable."

In *Weddle* v. *Loges*, 125, P. 2d 914, 52 Cal. App. 2d 115, the California court stated:

"At the outset, it should be noted that the verdict was for compensatory damages and special damages only; no punitive damages were awarded. The law appears to be well settled that where the action is for compensatory damages suffered as a result of a wrong in which both defendants joined, the damages cannot be severed. McCool v. Mahoney, 54 Cal. 491."

In *Merriott* v. *Williams,* 152 Cal. 705-711, 93 P. 875-878; 125 Am.St.Rep. 87, the Supreme Court of California declared:

> "In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from an injury inflicted, irrespective of the degree of culpability."

We submit that the foregoing cases clearly support the proposition of law that the damages to be assessed against two joint tort-feasors cannot be apportioned. In this case, the jury apportioned the damages in such obvious extremes, to-wit, $95,000.00 against defendants and $100.00 against the truck driver, that the defendants are at least entitled to a new trial.

Proposition of Law No. 5

> The verdict of a jury for damages, which is so excessive, unreasonable and outrageous as to shock the conscience of the court, and is beyond all measure of fairness, is actuated by partiality, passion and prejudice.

This proposition of law is in support of specification of error No. 6.

The law with respect to excessive verdicts is so flexible as to permit each case to stand upon its own bottom. In the case of *Stallcup* v. *Rathbun,* 76 Ariz. 62, 258 P. 2d 821, the jury awarded a verdict of $45,000.00, but after the plaintiffs remitted the verdict to $30,000.00, the court permitted the verdict to stand.

This case was for damages wherein a 22-year-old man, who was earning $350.00 per month prior to the accident, received injuries consisting of the dislocation of the right hip, fracture of the rim of the hip, and extensive lacerations, with a 25 per cent permanent impairment of the function of the leg, and a medical expense of $5,380.80. Although the court permitted the remitted verdict of $30,000.00 to stand, the court made a discussion of excessive damages, and therein stated that if the verdict was so excessive as to strike mankind at first blush as being beyond all measure, unreasonable and outrageous, then the jury manifestly had been actuated by passion and prejudice. There is a long line of cases which hold that verdicts as large as the one in the case at bar are excessive, wherein the injuries sustained are far less extensive.

In order to properly appraise the injuries of the plaintiffs Gossnell, we must review the facts. The plaintiff George Gossnell was at the time of the accident sixty-five years of age (T.R. 54). According to the mortality tables introduced at the trial, said George Gossnell had a probable life span of only about eleven years. According to the testimony adduced at the trial, the plaintiff George Gossnell suffered no loss of earnings, his employer having permitted his earnings to continue, (T.R. 69-70) and the record shows that the injuries of the plaintiff George Gossnell were healing at the time of the trial, (T.R. 190-195) and the said George Gossnell had no serious permanent injuries (T.R. 203).

The injuries of the plaintiff Estella Gossnell were slight and were soon healed. From a reasonable review of all the facts of the case, the verdict of the jury ap-

pears to be outrageous and unreasonable and was based upon passion and prejudice.

The fact that the jury rendered a verdict of $95,000.00 against the defendants Siebrand, and another verdict of only $100.00 against the truck driver Carroll, who was actually driving the truck at the time of the accident, demonstrates that the jury held passion and prejudice against the defendants Siebrand, for under no theory of law could the jury have properly found a variance in the responsibility of the defendants Siebrand and the truck driver Carroll other than through passion and prejudice against the defendants Siebrand. Stand Oil Co. of Cal., et al. vs. Shields, 58 Ariz. 239, 119 P. 2d 116; Rose vs. Missouri Dist. Telegraph Co., 328 Mo. 1009; 43 SW 2d 562; 81 A.L.R. 400; Kelly vs. Muscatine B&SR Co., 195 Iowa 17, 191 NW 525; Wooton vs. Dixon (1952) (Ky. Court of Appeals) 252. SW 2d 874.

Proposition of Law No. 6

> The admission of incompetent and immaterial evidence that is prejudicial to one of the parties to a law suit constitutes reversible error.

Specification of error No. VII will be discussed in connection with the argument on this proposition of law.

This proposition of law is so fundamental and universally accepted that we will cite only one case to substantiate it. In *Montgomery Ward and Company* v. *Wright,* 70 Ariz. 319, 220 Pac. 2d 225, the Court held that the admission of remote and immaterial statements which were prejudicial to the defendant constitutes reversible error.

To permit the plaintiffs to introduce evidence with respect to the absence of safety chains connecting the truck and trailer was prejudicial against the defendants. The laws of the State of Arizona do not require the use of safety chains on trucks pulling trailers, and there being no law requiring such safety chains, there was an inference that the defendants were negligent in the operation of the truck and trailer referred to in this case by permitting the introduction of evidence showing that no safety chains were used on said equipment. When the plaintiffs offered such evidence, the defendants objected, and the Court permitted the introduction of said evidence over the defendants objection. The following is the record with reference to said matter: (T. R. 238).

"Q. Now, as far as chains on that truck, you didn't have any safety—

MR. WILSON: I object as being immaterial.

MR. MAHONEY: Immaterial? It is very material.

THE COURT: He may answer.

BY MR. RAINERI:

Q. You didn't have any safety chains on that truck at all, did you?

A. No, sir, I did not.

It was clearly immaterial as to whether or not safety chains were used on the truck and trailer and to permit the admisison of the testimony relating to the absence of safety chains was prejudical to the defendants, contrary to the law applicable in such cases, and constituted reversible error.

Proposition of Law No. 7

> A statement by a member of a partnership who is not acting for the firm on the occasion in question would not be admissable to bind the partnership or other partner as to the matters contained in the statement.

Specification of Errors Nos. VIII and IX will be discussed in connection with the argument on this proposition of law.

In the deposition of Fred Clark, which was introduced in evidence over the objection of the defendants, Mr. Clark testified that he had a conversation with the defendant, P. W. Siebrand, and that in the course of the conversation, Mr. Siebrand stated that he was very sorry about the accident and was going to stand all damages and buy the plaintiffs a new car (T.R. 111 & 112). At the time of taking the deposition, Mr. Breen, representing the defendants, objected to the statement on the ground that it was hearsay and that any statement or admissions made by P. W. Siebrand could in no way bind the defendant Hiko Siebrand or the truck driver Carroll (T.R. 111). These same objections were made by defendants at the time of trial (T.R. 104, 105). The statement allegedly made by the defendant P. W. Siebrand was not made in the presence of the other defendants. It was not made before the accident or at the time of the accident so as to be part of the res gestae. There was no testimony that the defendant P. W. Siebrand was acting for and on behalf of the partnership when such statement was made. Consequently, this statement falls squarely within the proposition of law above stated, and to admit such statement was highly prejudicial to the defendants, Hiko Siebrand, truck

driver Carroll, and Siebrand Brothers Circus and Carnival.

The plaintiff, Estella Gossnell, testified that a day or so after the accident, the defendant, P. W. Siebrand, and the truck driver, Carroll, came to see her and, in the course of the conversation, Mr. Siebrand introduced the truck driver as "the man who was driving the truck for him that day." (T.R. 81). The defendants objected to such statements (T.R. 81). Again, on this occasion, the defendant, Hiko Siebrand, was not present. The statement did not occur at the time of the accident, but at least one, and maybe several days, after the accident, and there was no evidence that the defendant Siebrand, in making such statement, was acting for and on behalf of the partnership. The defendant Siebrand flatly denied making any such statement (T.R. 305). Likewise, the truck driver denied such statement was made (T.R. 234 & 235); but, assuming such statement was made, or the jury believed such statement was made, it could not be binding upon the defendant, Hiko Siebrand, and was highly prejudicial to him.

In *Looney* v. *Bingham Dairy,* 75 Utah 53, 282 Pac. 1030, the Supreme Court of Utah considered a similar question. In this case, a statement was allegedly made by a member of a partnership while inquiring about the condition of a boy who had been kicked by a horse belonging to the firm. Such statement was to the effect that the horse was mean and a kicker. It was urged that such statement was inadmissible against the partnership and the other partner, in that such statements were not shown to have been made in the course of or pursuant to partnership business, and was not admissible against the partner not making the statement.

The Court agreed with this contention, and at page 1033 of the Pacific Reports, stated:

> "We think the contention is well founded. The rule is that the admissions of one co-partner in respect to the joint business are competent against the firm and its members, but to render such admissions competent he must be acting as a partner about a partnership matter, or the admission must be made in relationship to matters within the scope of the partnership. 1 Ency. Evidence p. 579; 22 C. J. 403; 1 Elliott on Evidence 369; 2 Jones, Comms. on Evidence (2d, ed.) 1712. The rule is well illustrated and stated in the case of State v. Salmon, 216 Mo. 466, 115 S. W. 1106. The evidence here shows that the admissions or statements made by Furgis, and as testified to by the parents of the boy, were not made under such circumstances. The making of any of such statements or admissions was denied by Furgis. The admission of such testimony as against Makrakis and the firm was not only erroneous, but was prejudicial."

A few of the other cases supporting the Proposition of Law above quoted are: *Scott* v. *Mundy,* 193 Iowa, 1360, 188 N.W. 972; *Caswell* v. *Maplewood Garage,* 84 N.H. 241, 149 Atlantic 746; *Mansfield* v. *Howell,* 218 Mo. App. 557, 279 S.W. 1058.

Defendants submit that the statements made by the defendant, P. W. Siebrand, out of the presence of Hiko Siebrand and after the time of the accident were not admissible against the defendant Hiko Siebrand, and to admit such statements without qualifying them in any respect was prejudicial error.

Proposition of Law No. 8

The relation of joint adventurers is created where two or more persons combine their money,

> property or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly or in proportion to the capital contributed in the profits *and losses,* assuming that the circumstances do not establish a technical partnership.

Specification of Errors Nos. 3, 10, 11, 12, 13, 14, 15 and 16 will be discussed under this proposition of law.

While the law of joint adventurers is still a bit nebulous, the foregoing proposition of law states the generally accepted rule. This proposition of law was taken verbatim from 30 Am.Jur., Page 681, Sec. 7, and is more particularly discussed in 48 A.L.R. 1062 and 63 A.L.R. 914. It is important to note that it is necessary for the parties to share in the losses in order to establish a joint adventure. In 30 Am.Jur., Page 682, Sec. 12, the matter of sharing in losses is carefully discussed, and in this regard the following is stated:

> "It has been declared that at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses."

In the case at bar, one William Siebrand was running a bird concession in connection with the circus and carnival of the defendants. To put his concession in the show he paid rent on a footage or percentage basis (T.R. 254). The defendants did not share in the profits or losses of William Siebrand, and neither did William Siebrand share in any of the profits or losses of the defendants' circus and carnival (T.R. 288). William Siebrand was an independent business man operating his own business (T.R. 250, 257), and he could discontinue his concession at any time without the consent

of the defendants. There was no evidence in this case to show that William Siebrand exercised any voice or control in the operation of the business of the defendants.

Herewith is a case which is similar in facts to the case at bar:

In *Gottlieb Bros., Inc.* v. *Culbertson's,* 152 Washington, 205, 277 Pac. 447, Culbertson's conducted a large department store in Spokane, Washington. One Filas operated a fur department in the store, having a space of about fifty square feet upon the second floor of the department store. There was nothing to indicate that it was not a part of the business of Culbertson's. The janitor, telephone and cash carrying service were all furnished by Culbertson's. When the goods were sold, purchasers were given Culbertson's memoranda. If the sale was for cash, the money was turned into the accounting department of Culbertson's. If on credit, it was entered on the books of Culbertson's and they had charge of the collection. The agreement between Culbertson and Filas was that Filas was to pay Culbertson 15% of the gross sales of the furs and any other merchandise sold by Filas. Filas ordered certain merchandise from the plaintiff Gottlieb Bros. One order for merchandise was on Culbertson's stationery and the shipment of the goods was made to Culbertson and the goods received by Culbertson. Filas went bankrupt and the plaintiff, Gottlieb attempted to recover from Culbertson, contending that Culbertson and Filas were joint adventurers. At page 449 of the Pac. Reporter, in discussing this matter, the Court stated:

> "(1) Appellant bases its principal contentions upon the claim referred to above in the bankruptcy

proceeding that Filas and the respondent were joint adventurers in the fur business conducted in the department store of respondent. The trial court found that there were no facts sustaining a joint adventure, or any kind of partnership, and that the facts showed only that Filas rented space in the store of respondent for the sale of furs for which light, heat, and janitor service were furnished by respondent, and as rent respondent charged 15 per cent of the gross sales of the furs and other merchandise made by Filas. The above facts were undisputed. These facts create no more than the relation of landlord and tenant between respondent and Filas.

(2) To constitute a joint adventure, there must be more than the mere fact of a share in the profits of the business. There must be other facts tending to show that relation inter se, as the intent of the parties; or such facts as to estop denial of it as against third parties. Griffiths v. Von Herbert, 99 Wash. 235, 169 P. 587. See also Belch v. Big Store Co., 46 Wash. 1, 89 P. 174; Miles Co. v. Gordon, 8 Wash. 442, 36 P. 265.

"(3) One of the most important tests of a partnership or joint adventure is whether there is a share in losses. Miles Co. v. Gordon, supra; State ex rel Ratliffe v. Superior Court, 108 Wash. 443, 184 P. 348.

"(4) It is manifest that there was nothing in the relationship shown between Filas and respondent which would constitute them joint adventurers under our cases. Neither were there any such facts shown as would estop them to deny a joint adventure as against third parties. That such tenancies, even upon conventional term leases, are not unknown, based upon rentals consisting of a percentage of the gross income. See Cissna Loan Co. v. Baron (Wash.) 270 P. 1022."

In *Estrella* v. *Suarez,* 60 Ariz. 187, 134 P. 2d 167, the court held:

> "Under all the authorities, sharing in the profits is necessary to create a joint adventure which is merely a partnership for a single transaction."

The only possible evidence which might tend to show that the defendants and William Siebrand were in a joint adventure is: first, the sign painted on the side of the trailer owned by William Siebrand, which read: "Siebrand Brothers Carnival and Circus." (T.R. 256); second, policeman John D. Boyd's statement that the trailer contained rides, concessions and stuff for a carnival (T.R. 142); and third, Peter H. Siebrand, a son of the defendant P. W. Siebrand, testified that he assisted in getting the trailer from Tempe to Mesa after the accident (T.R. 285). This testimony falls far short of establishing joint adventure between the defendants and William Siebrand.

It is not uncommon for advertisers to paint signs on the side of trailers, even though they have no direct interest in the trailer. Ralph Horstman testified that the Pepsi Cola Co. had the following ad on the side of his concession: "For a light refreshment, drink Pepsi Cola." He further testified that the Pepsi Cola Co. owned no interest in his concession (T.R. 278). Certainly no one would dispute this proposition. Likewise, William Siebrand testified that the defendants owned no interest in his concession (T.R. 250). There was no tie-in shown in any respect concerning the policeman looking in the trailer and testifying that it contained rides, concessions and stuff for a carnival, and also no tie-in was shown in Peter H. Siebrand's assisting in getting the trailer from Tempe to Mesa. Taking this

testimony in its most favorable light, at most, it would only produce an inference that there was some connection between the defendants and William R. Siebrand, and this inference was conclusively overcome by the many positive statements of both the defendants and William Siebrand that the defendants did not own or have any interest in the trailer (T.R. 250, 271 & 288).

Assuming, but without admitting that it is not necessary that the parties share the losses in a joint adventure, almost without exception the cases approve the following definition of a joint adventure:

> "A joint adventure is an association of persons to carry out a single business enterprise for profit for which they combine their property, money, efforts, skill and knowledge, and each participant therein is an agent for each of the others, and it is essential that each have control of the means employed to carry out the common purpose." Torietto v. G. H. Hammond Co., 110 Fed. 2d 135; Soulek v. Omaha, 140 Neb. 151, 299 NW 368."

It is the contention of the defendants that there was not sufficient evidence of joint adventure for the court to give instructions concerning joint adventure, but assuming there was such evidence, then the court should have given the proper definition of joint adventure. This it did not do. In defendants' requested instructions Nos. 2 and 3, a correct definition of joint adventure was set forth, but the court refused to give these instructions (T.R. 35, 36 & 37). In defendants' requested instruction No. 4, they requested that an instruction be given to the effect that if the agreement between William R. Siebrand and the defendants was an agreement for the rental of space, such agreement did not constitute a joint adventure. We submit that

this was a proper statement of law, and under the case of Gottlieb Bros., Inc. v. Culbertson, supra, such instruction should have been given. In giving the plaintiffs' instruction No. 2 (T.R. 22), the court failed to give a proper definition of joint adventure. The pertinent part of this instruction is as follows:

> "If you find from a preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand and William Siebrand intended and did join their efforts in furtherance of the circus and carnival show to be shown at the Maricopa County Fair at Mesa for their joint profit, then you may find that they were joint adventurers."

This instruction fails to give all of the elements of joint adventure, as heretofore set out. It mentions nothing of sharing losses; it mentions nothing of each having control over the joint adventure; it mentions nothing about each participating therein. The only element that it does have is—"if the parties join together for their joint profit." We submit that the facts do not substantiate the element that the defendants and William Siebrand had an agreement wherein each was to share in the profits. Under their agreement, the defendants were to get a definite percentage of the gross profits, and in many instances William Siebrand might fail to make a net profit, or even might have losses, and the defendants would still get the amount due them for rent from the gross profits.

Plaintiffs' requested instruction No. 3 (T.R. 23) is concerned with the liability of joint adventurers. We urge that it was error for the court to give this instruction without having properly defined joint adventure, and where there was no competent evidence of joint adventure.

The pertinent part of defendants' requested instruction No. 5 is as follows: (T.R. 24).

> "If you find from a preponderance of the evidence that the act of the defendant S. J. Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise which P. W. Siebrand, Hiko Siebrand and William Siebrand were interested in, then in such event, you are instructed that P. W. Siebrand, Hiko Siebrand and William Siebrand were joint adventurers."

Again, we respectfully urge that this falls far short of giving a correct definition of a joint adventure. The only requirement for joint adventure under this instruction is that the parties have an interest in a certain business enterprise. Many persons may have had some interest in the trailer being taken from Phoenix to Mesa, but certainly that alone wasn't sufficient grounds to constitute all persons so interested as joint adventurers.

Plaintiffs' instruction No. 8 provides in part as follows: (T.R. 26).

> "You are instructed that a duty rests upon every man in the management of his own affairs, whether by himself or his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured, he shall answer for the damage."

The second part of this instruction then goes on to state that imputed negligence stems from the joint enterprise. This instruction fails to properly state the law in that if the law were as above stated, every person would be an insurer of all acts of his agent. Nowhere does it state that such liability depends upon the negli-

gence being the proximate cause of the injury, but it is flatly stated that if injury occurs by one's servant, the master is liable. Obviously, this is not the law.

Again we assert that at no time did the plaintiffs in their instructions include a correct definition of joint enterprise, and the Court committed error in giving the instructions relating to joint adventure without first stating a proper definition. Furthermore the Court committed prejudicial error in giving instructions on joint adventure which did not correctly state the law on the subject.

Proposition of Law No. 9

> The payment of the money due under a judgment is a compliance of the mandate of the judgment and is considered the satisfaction of a judgment, and the court is without jurisdiction to prevent the satisfaction of a judgment when the judgment debtor complies with the judgment of the court.

This proposition of law supports specification of error No. XVII.

The general rule of law is that when a judgment debtor complies with a judgment of the court, then the judgment has been satisfied. The jurisdiction of the court continues until the satisfaction of the judgment, and then it ceases.

In the case of *Gulf, Colorado, and Santa Fe Railway Company* v. *E. B. Muse, District Judge,* 109 Tex. Reports 352, 207 S.W. 897, 4 A.L.R. 613, we find a state of facts wherein the judge had extended a term of court for the purpose of completing a trial and entering

the orders and the judgment in the case. After the final judgment was entered, the plaintiff applied for a writ of mandamus which would have compelled the court to take further jurisdiction in the cause. The Supreme Court of Texas ruled that once a judgment has been entered that the jurisdiction of the court ceases. Quoting from this case, as reported on page 900 of Southwest Reports, we find the following:

> "It is the very essence of defendant's right that he is entitled not to have to respond further to plaintiff's cause of action than by payment of his judgment."

Obviously, in the case at bar, the defendant, truck driver Carroll, would not have to respond further than the payment of the judgment entered against him; and the court was without jurisdiction to prevent satisfaction of the judgment. In the case of *Wright* v. *Swayne,* 104 Tex. 444, 140 S.W. 222, the Supreme Court of Texas said the following:

> "If the court shall wilfully refuse to execute its own judgment according to their true intent and affect, we would have the authority and it would be our duty to direct it to proceed to execute the judgment and sentence of the law."

According to this statement of the law, it is within the province of the United States Court of Appeals in the present case to direct the United States District Court of Arizona to accept satisfaction of the judgment against the truck driver Carroll.

When the truck driver Carroll paid the amount of the judgment against him into court, the Court was without jurisdiction to refuse satisfaction. It would

appear that the Court then realized that the satisfaction of the judgment against the truck driver Carroll would be a complete discharge and satisfaction of the judgment against the defendants Siebrand, and therefore, in an attempt to save the judgment against the defendants Siebrand, stepped outside of its jurisdiction and attempted to prevent the satisfaction of the judgment against the truck driver Carroll. Obviously, the Court had no jurisdiction to do this.

It is self-evident from the foregoing that once the judgment against the defendant, truck driver Carroll, had been satisfied, the judgment against all of the judgment debtors, including the defendant Siebrands, would have likewise been satisfied, for the satisfaction of a judgment against one judgment-creditor is a satisfaction against all judgment-creditors who are liable in the same cause of action.

In the Restatement of the Law of Judgments, Sec. 95, P. 469 we find the following:

> "The discharge or satisfaction of a judgment against one of several persons each of whom is liable for a tort, breach of contract, or other breach of duty, discharges each of the others from liability therefor."

From the foregoing, it is apparent that the payment of the judgment by the truck driver Carroll satisfied such judgment against the defendants. The Supreme Court of Arizona has repeatedly said that, except where otherwise stated by the Court, the Court would follow the Restatement of the Law. *Normort* v. *Smith,* 51 Ariz. 134, 75 P. 2nd 38.

Conclusion

For the reasons heretofore stated, we respectfully urge that this Court should declare that the judgment against the truck driver Carroll has been satisfied and thus the judgment against the defendants Siebrand has been satisfied. Should the Court disagree on this point, we then urge the Court that a new trial should be granted limiting the amount of damages to be assessed against the defendants to the sum of One Hundred Dollars ($100.00), the amount heretofore recovered against the truck driver Carroll. In the event the Court disagrees with the first two propositions, we submit that at least the defendants are entitled to have the Ninety Five Thousand Dollar ($95,000.00) judgment reversed and a new trial awarded. Should the Court likewise disagree with this contention, then we respectfully urge that the verdict against the defendants Siebrand is excessive and was granted under passion and prejudice and should be limited to a reasonable amount.

Respectfully submitted,

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